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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 612

SOLOMON MICHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 177–183) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 26, 1948 (R. 183–184). The petition for a writ of certiorari was filed February 20, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court erred in permitting the prosecutor to ask defendant's character witnesses on cross-examination whether they had ever heard that defendant had been arrested on a charge of receiving stolen goods.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of New York for bribery of a federal officer in violation of Section 39 of the Criminal Code (18 U. S. C. 91). The first count charged that he gave a bribe of $5,000 to Kratter, an agent of the Bureau of Internal Revenue, in connection with an income tax investigation; the second charged the offering of the same bribe (R. 2–3). After a jury trial, petitioner was found guilty on both counts; he was sentenced to 18 months' imprisonment on each count, the terms to run concurrently, and was fined $1 on the first count and $2,500 on the second (R. 163, 171–172). On appeal, the judgment was affirmed as to the first count, but reversed as to the second on the ground of improper venue (R. 177–184).

The payment of the $5,000 by petitioner to Agent Kratter was not disputed at the trial; the principal and "virtually the only issue" was whether petitioner was entrapped by Agent Kratter (see Pet. 4). The evidence for the Government may be summarized as follows:

Kratter testified that, having been assigned to investigate petitioner's records, he first visited petitioner's place of business[1] for about twenty minutes in the mid-afternoon of July 16, 1946, and made arrangements to begin the examination the following day (R. 8–10, 31, 33). He returned at about 11:00 a. m. on July 17, 1946, and began his investigation of the books (R. 10–11, 31–33). About 12:30 p. m. he asked petitioner for substantiation of certain entries (R. 11–12). Petitioner suggested that they go out to lunch together and during the meal he inquired what would have to be done to straighten out his returns. Kratter answered that he would have to finish the examination before he could say. (R. 13, 34.) After lunch, despite Kratter's desire to return to his examination of the books, petitioner insisted that they take a walk and discuss the matter. During the walk, which lasted an hour, petitioner offered Kratter first $100, then $250, then $300, and finally $800. After numerous refusals, Kratter, in order to get back to the store, at last agreed to take the money.[2] (R. 14–16, 35–37.) A short time after they had returned, petitioner dropped a package at Kratter's feet saying, "Here is the $800." When Kratter finished his examination at

[1] Petitioner, a second hand jewelry dealer, leased two counters in a large store occupied chiefly by jewelry merchants (R. 31, 81).

[2] Kratter testified that Internal Revenue Agents do not examine books unless the taxpayer or his accountant is present (R. 15).

about 4:00 p. m. he handed the package back to petitioner. Petitioner continued to insist, detained Kratter in the store, walked down the street with him, refused to leave him, and offered him $3,000, then $5,000. Finally Kratter, in order to get away, agreed to take the money, gave petitioner his home telephone number in response to petitioner's request, and then went home. (R. 16–19, 37–40.) On the following day, July 18, 1946, Kratter had an appointment for an examination of another matter in the morning, but in the afternoon he returned to his office and told an older agent of petitioner's offer[3] (R. 21, 41–42). The next day, July 19, 1946, he was taken to see Agent Yung, of the Intelligence Unit, and thereafter acted under Yung's direction (R. 21–22, 43, 65).

In the evening of July 19, 1946, petitioner called Kratter's home and left a telephone number for Kratter to call. On Monday morning, July 22, 1946, Kratter, in Yung's presence, called that number and asked what was wanted; petitioner answered that he was trying to get the money and told Kratter to call again Friday. Kratter did so, again in Yung's presence, and petitioner said he wanted to give him the money. Kratter suggested a meeting in a hotel room, and when petitioner objected, Kratter said he was taking the

[3] Kratter was relatively inexperienced, having been with the Bureau of Internal Revenue for only about six months (R. 7, 48–49).

money only because petitioner insisted and petitioner would have to follow his plan. (R. 22–27, 43, 66.)

On Monday morning, July 29, 1946, Yung, Kratter and four other agents set up a listening device in a hotel room and Kratter then called petitioner. When petitioner entered the room he dropped a package containing $5,000 on the dresser. He asked Kratter to report $900 owing on his 1942 tax return and $1200 on his 1943 return. Kratter said, "You understand the only reason I am doing this is because you insist upon it, isn't that so?" to which petitioner responded, "Yes, that is right." (R. 27–29, 44.) The other agents, having heard the conversation over the listening device in a nearby room, arrested petitioner when he stepped out into the hall (R. 29, 52, 55–62, 66–70, 72). Petitioner admitted to them that he had given the $5,000 to Kratter. When asked to explain, he made no accusation against Kratter, but said only that he would explain to the proper party. Agent Yung informed him that he was a representative of the Commissioner of Internal Revenue but petitioner still refused to explain. He was then taken to an Assistant United States Attorney's office, who informed him that he need not answer questions and that whatever he said might be used against him, but also for him. Petitioner said, "Anything I could say would only hurt me." (R. 29–30, 68–69.)

Petitioner testified in his own behalf that Kratter came to his place of business on the morning of July 15, 1946 (R. 81); that after he had been there a short time, he asked petitioner for $800 and said he had enough on petitioner to call in the F. B. I. and have him locked up (R. 83–84); that they went to lunch together and then took a walk, during which Kratter continued his threats and raised his demand to $1,000, and then to $5,000 (R. 86–89); that Kratter gave him his home telephone number when he left that afternoon and told him to call when he had the money (R. 90–91); that Kratter called several times in the next few days repeating his threats (R. 91–93); and that he finally took the money to Kratter in the hotel (R. 93–94). Gerstein, who occupied the counter next to petitioner in the store, also testified that Kratter's visit was on July 15, 1946 (R. 119), but although he was only six or seven feet away and heard Kratter and petitioner arguing, he did not hear Kratter make any threats, nor did petitioner at that time tell him of any demand (R. 120–122). Osterfeld, petitioner's accountant, also testified that Kratter came on July 15, 1946, and that petitioner told him that Kratter had asked for $5,000 (R. 132–133); but he admitted that he understood the demand to be, not for a bribe, but for back taxes (R. 134, 137).

ARGUMENT

The basic contention in the petition is that the trial court erroneously permitted the prosecuting attorney to cross-examine petitioner's character witnesses in respect of his arrest on a charge of receiving stolen property. Petitioner introduced five witnesses who testified that his reputation for honesty and truthfulness was excellent (R. 125–131, 137–139). Four of these witnesses were asked on cross-examination whether they had ever heard that petitioner had been arrested in 1920 for receiving stolen goods; all four gave negative answers (R. 126, 129, 131, 138–139). When the questions were asked, and again in the charge, the court carefully instructed the jury that there was no proof in the case that such arrest ever took place, and that the questions were permitted only to test the standards upon which the witnesses based their opinion of petitioner's character (R. 127, 130, 154). Furthermore, the court required of the prosecutor, as proof of his good faith, assurance that petitioner had been arrested for receiving stolen goods (R. 146–147).[4]

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[4] As evidence of this fact, the prosecutor tendered Exhibit 6, which the court had the reporter mark for identification (R. 147). While the exhibits are not in the printed record (see R. 175), the Government's brief in the circuit court of appeals states that this document was the record of petitioner's arrest in 1920.

1. The circuit courts of appeals have, without exception, held that when the accused puts his character in issue by bringing forward reputation witnesses, such witnesses may be asked on cross-examination whether they have heard of specific charges, or rumors, of other misconduct on the part of the accused. *Josey* v. *United States*, 135 F. 2d 809, 811 (App. D. C.); *United States* v. *Commerford*, 64 F. 2d 28, 30–31 (C. C. A. 2), certiorari denied, 289 U. S. 759; *Chiccarello* v. *United States*, 68 F. 2d 315 (C. C. A. 3); *Mannix* v. *United States*, 140 F. 2d 250, 252 (C. C. A. 4); *Proctor* v. *United States*, 100 F. 2d 350 (C. C. A. 5); *Lawrence* v. *United States*, 56 F. 2d 555, 556 (C. C. A. 7), certiorari denied, 286 U. S. 565; *Spalitto* v. *United States*, 39 F. 2d 782, 785–787 (C. C. A. 8); *Mitrovich* v. *United States*, 15 F. 2d 163, 164 (C. C. A. 9); *McBoyle* v. *United States*, 43 F. 2d 273, 275 (C. C. A. 10), reversed on other grounds, 283 U. S. 25.

Petitioner, relying upon 3 Wigmore, *Evidence* (3d ed. 1940), § 988, and two Illinois cases, *Aiken* v. *People*, 183 Ill. 215, 55 N. E. 695, and *People* v. *Hannon*, 381 Ill. 206, 44 N. E. 2d 923, contends (Pet. 6, 19–25) that the rule should be changed and that such cross-examination of character witnesses should be forbidden unless the questions relate to misconduct which has some connection with or relevance to the crime for which the defendant is being tried. A careful examination of the cited passage from Wigmore reveals that

he holds it to be "proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge," but that, because of the inherent possibilities of abuse, the practice should be "strictly supervised by forbidding it to counsel who do not use it in good faith." And Wigmore criticizes the Illinois decisions as "misconceiving the nature of the problem and citing none of the cases pertinent." 3 Wigmore, *Evidence* (3d ed. 1940), § 988, footnote 1.

Of course, it is true that, just as the defendant's reputation witnesses must be limited in their testimony to the specific trait of character involved in the accusation, 1 Wigmore, *Evidence* (3d ed. 1940), § 59; *Morris* v. *District of Columbia*, 124 F. 2d 284 (App. D. C.), so also the cross-examination must be limited to charges or rumors of offenses involving conduct inconsistent with that trait.[5] *Josey* v. *United States, supra.* Here, where the trait of character involved was honesty, the relevance of a charge of receiving stolen goods is obvious.

2. But petitioner urges (Pet. 6, 13–19) that, even if the rule uniformly followed in the federal courts is correct, the trial court misapplied it in holding itself bound to permit the questions, whereas the cases hold that such questions may be excluded in the court's discretion when their mis-

[5] We think this must have been what Judge Frank, writing for the court below, had in mind in footnote 8 of the opinion (R. 181–183).

chievous effect outweighs their possible value as tests of the witness' standard of opinion. We find nothing in the record to indicate that the trial judge felt himself bound to allow the questions.[6] On the contrary, as we noted above (*supra*, p. 7), he required the prosecutor to show that the questions were based on fact, and he specifically stated that he was following Wigmore's suggestion that the asking of such questions be strictly supervised (R. 147). Nor was there an abuse of discretion in permitting the questions, for, as we have just pointed out, they were clearly relevant to petitioner's reputation for honesty. Petitioner insists that questions as to an arrest for receiving stolen goods twenty-six years prior to the present case had a mischievous effect outweighing any possible relevance (Pet. 14, 17, 21–22). If this had been a youthful indiscretion, or a totally isolated shadow upon his reputation for honesty we might agree. But petitioner was about thirty years of age at the time of the 1920 arrest and had already been engaged in the second-hand jewelry business for several years (R. 78–79). Furthermore, he admitted that in 1927 he had been convicted and fined for possession of counterfeit watch dials (R. 79–80, 101–102)—a matter which the prosecutor also brought to the attention

[6] Petitioner's objection at the trial was, not that the questions should be excluded as a matter of discretion, but that they should be excluded as attempts to impeach his character by proof of other arrests (R. 130).

of the reputation witnesses, without objection by petitioner (R. 126, 129, 131, 138). In a case involving a matter of financial honesty petitioner chose to introduce evidence as to his good reputation for business honesty. Under the circumstances we think the court was clearly within its discretion in permitting the witnesses to be examined as to whether their estimates took into consideration these derogatory reports in connection with his business dealings.[7]

3. In arguing that the disputed questions created undue prejudice, petitioner contends that the Government's case was not "strong" (Pet. 24), and he appears to challenge indirectly the sufficiency of the proof to show that the criminal plan originated with him and not with Kratter (see Pet. 4, 12, 21). We think it is clear from the evidence summarized in the Statement, *supra,* that the Government's case was by no means such that the disputed questions tipped the scales against petitioner. Of particular significance is the fact that during the meeting in the hotel room, petitioner admitted that he had insisted that Kratter do something for him (*supra,* p. 5), and the further fact that after his arrest, although given the opportunity, he made no accusation against Krat-

[7] Petitioner contends (Pet. 23) that the question as to the 1920 arrest should not have been put to one of his witnesses who had known him only since 1932. But, as the court below said (R. 181–182), she could have heard rumors of such arrest.

ter but said only that anything he might say would hurt him (*supra*, p. 5).[8]

CONCLUSION

The decision of the circuit court of appeals is correct and no conflict of decisions is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1948.

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[8] Petitioner also claims that it was improper for the prosecutor to ask him on cross-examination whether, in a 1930 application for a license as a vendor of second-hand jewelry, he had not failed to state that he had been convicted in 1927 of "counterfeiting trademarks on watches" (R. 100–101). Petitioner had testified himself on direct examination that he had been convicted in 1927 of possessing counterfeit watch dials (R. 79–80). His counsel objected to the prosecutor's question on the ground that the conviction had been for possession, not counterfeiting. The court sustained the objection "on that ground," and then rephrased the prosecutor's question. Petitioner answered it without further objection. (R. 101–102). Obviously, in view of the correction, no prejudice resulted from the original form of the question.